A

ROBERT DORAN & ORS

v.

KUAN PEK SENG & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
K ANANTHAM JC
[SUIT NO: D22 NCC-56-2009]
26 OCTOBER 2009

C

CIVIL PROCEDURE: *Mareva injunction - Requirements to be satisfied - Real risk of dissipation of assets - Plaintiffs have good arguable case with prospect of success at trial - Issue of whether the two shareholder agreements are subsisting or determined - Whether constitutes a serious question to be tried - 22nd defendant's assets still within the jurisdiction -*

D

Assets of 1st and remaining defendants also within jurisdiction of the court - Overwhelming evidence of prima facie dishonest conduct on 1st defendant's part - Real risk that judgment in plaintiffs' favour would remain unsatisfied due to real risk of dissipation of assets

E

The plaintiff applied for a Mareva injunction against the 1st, 2nd, 3rd, 4th, 13th, 14th, 19th and 21st defendants (encl. 4). The court granted an *ex parte* injunction in terms of encl. 4 on 16 September 2009 until 29 September 2009 and on that day extended the same until further order. In the interim, the defendants filed encl. 13 to

F

set aside the injunction order and/or to vary the same. The plaintiff's claim arises from two shareholder agreements involving the plaintiff, the 1st defendant and originally two other persons. The two shareholder agreements led to the acquisition of two companies in the form of the 21st and 22nd defendants to

G

implement the intention of the shareholders. The plaintiff contends that pursuant to the two shareholder agreements and the circumstances here, the 1st defendant and the 1st plaintiff are partners and in a fiduciary relationship and thereby obliged to act with utmost good faith, mutual trust, and confidence with each

H

other. The 1st plaintiff did not exercise his right to control the Board of Directors of either the 21st or 22nd defendants and was content to allow the 1st defendant and his nominees to control the Board of Directors. Resolutions were passed by the 22nd defendant in April and May 2008 which effectively resulted in the 1st

I

defendant securing full control of the Board of Directors of the

22nd defendant. Thereafter the assets of 22nd defendant were transferred to the 15th to 17th defendants purportedly by way of set-off of monies due from the 22nd defendant and the 22nd defendant was voluntarily wound-up. The 1st plaintiff held the 1st defendant and his associates in the form of the remaining defendants responsible for the current state of the 22nd defendant and brought an action for *inter alia* declaratory relief and damages for breach of the shareholder agreements and of fiduciary duties owed to him by the 1st defendant. The 1st defendant contended *inter alia*, that the shareholder agreements had been determined by the conduct of the parties and consequently he owed no duties to the 1st plaintiff, that the 22nd defendant owed substantial sums to creditors such as the 15th to the 17th defendants and the set-off of the claims of these creditors by the transfer of the 22nd defendant's assets was reasonable and that the voluntary winding-up of the 22nd defendant was the natural consequence of the company being without any factory premises and machinery and without income and ability to meet its numerous creditors.

Held (allowing the plaintiff's application in encl. 4 and dismissing prayers (a) and (b) of the defendant's application in encl. 13 with costs)

(1) The duty of a judge at the hearing of an *inter partes* application for a Mareva injunction is to not make findings of fact but merely determine whether the applicant satisfies the three-fold test that the applicant had a good arguable case; that the respondent had assets within the jurisdiction; and that these was a real risk of the assets being dissipated or removed before judgment. There must be solid evidence to establish the risk. *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* (foll); *S&F International Ltd v. Trans-Con Engineering Sdn. Bhd* (refd), *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. UND CO. K.G* (refd). (paras 8 & 9)

(2) The plaintiff had discharged the burden as regards the first ingredient. The evidence produced by the plaintiff demonstrated a good arguable case with the prospect of success at the trial. Although there was evidence that the terms of the shareholder agreements were not always implemented to the letter of the agreement, the 1st defendant had always acknowledged the 1st plaintiff as the majority shareholder of both companies as

A evidenced by the respect accorded by him to directives originating from the 1st plaintiff. Whether the two shareholder agreements are subsisting or determined, in law, is a serious question to be tried. (para 10)

B **(3)** The assets of the 22nd defendant are still within the jurisdiction as the 1st defendant acknowledged having transferred the assets of the 22nd defendant to three locally registered companies in the form of the 15th to the 17th defendants. Additionally, there seems to be other assets belonging to the 1st defendant and the C remaining defendants within the jurisdiction of this court. (para 10)

(4) There is overwhelming objective evidence of *prima facie* dishonest conduct on the part of the 1st defendant and his associates in the form of the remaining defendants and a real D risk of the defendants dissipating the assets to avoid satisfying any judgment that the plaintiff may obtain in this action. A refusal of the injunction would involve a real risk that any judgment in favour of the plaintiff would remain unsatisfied due to the risk of the dissipation of assets. Thus it is just and E convenient to grant the prayers sought by the plaintiff in encl. 4 until the trial of this action and dismiss prayers (a) and (b) of encl. 13 with costs. (paras 12 & 13)

Case(s) referred to:

F *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA* ***(foll)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***

Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. UND CO. K.G [1984] 1 All ER 398 ***(refd)***

G *S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280* ***(refd)***

For the plaintiffs - David Morais (Leong Phaik Leng with him); M/s Sreenevasan Young

H *For 1st, 2nd, 3rd, 4th, 13th, 14th, 19th-21st defendants - Prem Ramachandran; M/s Kumar Partnership*

For 5th, 6th, 15th, 16th & 17th defendants - Prem Ramachandran; M/s Balviender Singh Kenth

For 22nd defendant - Gregory Ling; M/s Ranjit Singh & Yeoh

I *Reported by Susheila Sreedharan*

JUDGMENT

K Anantham JC:

[1] The plaintiff by summons (encl. 4) sought an injunction by way of Mareva against the 1st, 2nd, 3rd, 4th, 13th, 14th, 19th and 21st defendants. The second prayer in the summons is for disclosure by way of affidavit of the whereabouts of the assets of the same defendants. Prayer 3 is for the disclosure of corporate and financial documents of the 1st, 3rd, 4th, 7th, 10th, 21st and 22nd defendants. Prayer 4 is to restrain dealings on the specific property described in the summons as the 'Tiffany'. This injunction is directed against the 3rd, 4th and 20th defendants. I had granted an *ex parte* injunction in terms of encl. 4 on 16 September 2009 until 29 September 2009 and on that day extended the same until further order. In the meantime, the defendant's filed encl. 13 to set aside the injunction order and/or to vary the same.

[2] The plaintiff's claim arises from two shareholder agreements involving the plaintiff, the 1st defendant and originally two other persons known as Parker and Michael Tiong. Parker and Michael Tiong have withdrawn from the business and consequently not cited as defendants. The two shareholder agreements were intended to create two types of businesses involving plastic recycling processes, namely, Flaking and Staple Fibre. The two shareholder agreements led to the acquisition of two companies in the form of the 21st and 22nd defendants to implement the intention of the shareholders. The 22nd defendant was for the flaking business and the 21st defendant for the staple fibre business.

[3] The two shareholder agreements are substantially similar. The terms of the two agreements, when implemented, would have resulted in the 1st plaintiff holding a majority in terms of the number of board members and the highest percentage of shares among the shareholders of the 21st and 22nd defendants. There was provision for the passing of a circular resolution subject to the same being in writing and unanimously approved by all the directors. The quorum for shareholder meetings is the majority of shareholders present personally or by proxy or by their representatives. This meant that the 1st plaintiff's interest had to be represented at all members' meetings. The 1st defendant was nominated the

A Managing Director whilst the position of Non-Executive Vice-Chairman was the role assigned under the agreements for the 1st plaintiff.

[4] The plaintiff contends that pursuant to the two shareholder
B agreements and in all the circumstances of this case, the 1st defendant and the 1st plaintiff are partners and that they accordingly are in a fiduciary relationship and thereby are obliged to act with each other with utmost good faith, mutual trust, and confidence. In truth, the 1st plaintiff did not exercise his right to control the
C Board of Directors of either the 21st or 22nd defendants and was content to allow the 1st defendant and his nominees to control the Board of Directors, notwithstanding, providing the bulk of the finance required by the two companies in the pursuit of the Flaking and Staple Fibre business. The first time the plaintiff sought to
D exercise some form of control over the management of the 21st and 22nd defendant was when he appointed Mr. Philip Finlay as the Managing Director of the 22nd defendant in February 2008. Mr. Finlay replaced the 1st defendant as a Managing Director of the 22nd defendant in February 2008. Notwithstanding, the appointment
E of Mr. Finlay, the 1st defendant continued to have a free hand to negotiate the agreement with Jiang Yin Zhong Rui Non-woven Fabric Machinery Company Limited for the purchase of the Staple Fibre Line and other equipment. The 1st plaintiff also agreed to the 1st defendant's recommendation to appoint the 15th defendant
F as the contractor for the construction of the factory intended for the manufacturing activities of the 22nd defendant.

[5] A milestone concerning the 22nd defendant is the resolutions passed by the company in April and May 2008. These resolutions
G were passed based on the earlier amendment to article 90 of the Articles of Association of the company enabling the company to pass circular resolutions without the consent of the 1st plaintiff or his interest. The 1st defendant effected this amendment purportedly by representing to Mr. Finlay that an amendment to article 90 was
H essential to enable the company to obtain additional guarantee facilities from the bank. Having secured Mr. Finlay's approval to amend article 90 for this purpose, according to Mr. Finlay, the 1st defendant then caused to be passed these resolutions which effectively resulted in the 1st defendant securing full control of the

I

Board of Directors of the 22nd defendant. Once the 1st defendant secured control of the 22nd defendant, the following events took place very swiftly.

a) Mr. Cheong Chan Wan (Cheong) was appointed a director of the 22nd defendant;

b) Cheong was appointed to take over the removal and sale of all material including processed material in the factory to the exclusion of Mr. Philip Finlay and additional security guards engaged at the factory of the 22nd defendant reporting to him directly so as to ensure that Cheong was solely in charge of this whole exercise;

c) The re-organisation of the security arrangements at the factory, according to Mr. Philip Finlay, in fact, turned out to be the replacement of the old guards with new security personnel who only allowed entry into the factory premises to limited people and Mr. Finlay was not one of them (see para 100 of encl. 2). This prompted Mr. Finlay to tender his resignation;

d) The assets of 22nd defendant were transferred to 15 to the 17th defendant purportedly by way of set-off of monies due to this company from the 22nd defendant (see para 19 of encl. 25) and

e) The 22nd defendant was voluntarily wound-up, presumably by resolution passed by the Directors of 22nd defendant although the 1st defendant states that he ceased to be a Director by that time (see para 20 of encl. 25).

[6] The 1st plaintiff is not surprisingly most upset with the current state of the 22nd defendant particularly since, it is not in dispute, that he has contributed in cash and kind far more than the 1st defendant. The 1st plaintiff holding the 1st defendant and his associates in the form of the remaining defendants responsible for the current state of the 22nd defendant, brings this action for *inter alia* declaratory relief and damages. The plaintiffs allege that the acts of the 1st defendant in amending article 90 of the articles of association, causing the assets of the 22nd defendant to 'disappear' and finally liquidating the 22nd defendant without his knowledge and consent are clearly acts in breach of the shareholder agreements and of the fiduciary duties owed to him by the 1st defendant. The

transfer of the assets of the 22nd defendant to the 15th to the 17th defendant only came to light after the commencement of this proceeding.

[7] The defence of the 1st defendant to all of these allegations may be summarised to be as follows:

a) The shareholder agreements had been determined by the conduct of the parties (see para 77 of encl. 13) and consequently he owed no duties to the 1st plaintiff;

b) That the amendment to article 90 is valid as the proper and valid shareholders of the 22nd defendant on 15 August 2007 were Deric Leong and the 1st defendant. By reason thereof, the members resolution approved by both of them constituted the approval of 100 % of the members of the company (see para 77.6 of encl. 13). That the resolution was, in any event, approved by all the Directors.;

c) That the 22nd defendant owed substantial sums to creditors such as the 15th to the 17th defendants and the set-off of the claims of these creditors by the transfer of the assets of the 22nd defendant by way of compromise was reasonable having regard to the value of the machinery as compared to the outstanding sum payable on their invoices (see para. 19 of encl. 25); and

d) That the voluntary winding-up of the 22nd defendant was the natural consequence of the 22nd defendant being without any factory premises and machinery and without income and ability to meet its numerous creditors (see para 82 of encl. 13 and para 20 of encl. 25); and

e) In respect of the Kiara Tiffany Apartment, that Titanic Capital is the beneficial owner of the same as it was acquired through shareholder advances and bank borrowings of the company and its principals (see para 86 of encl. 13)

[8] It is trite law that the duty of a judge at the hearing of an *inter partes* application for a Mareva injunction is to not make findings of fact but merely determine whether the applicant satisfies

the three-fold test set-out in the earlier authorities. The Court of Appeal had occasion to restate this three-fold test in *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 as being;

a) first, that the applicant had a good arguable case;

b) secondly, that the respondent had assets within the jurisdiction; and

c) thirdly, that they was a real risk of the assets being dissipated or removed before judgment. There must be solid evidence to establish the risk.

[9] In the context of the above ingredients, the Federal Court in *S&F International Ltd v. Trans-Con Engineering Sdn. Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280, adopted the pronouncements of Mustill J in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. UND CO. K.G* [1984] 1 All ER 398 that "(1) before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than a fifty per cent chance of success, (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg, that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice: (3) in reaching its conclusion, the court should take into account the defendant's evidence as well as the plaintiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case [1983] 1 WLR 1412; [1984] 1 All ER (at p. 413) restated the principles of Mareva applications and held that the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, *inter alia*, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction" (see p. 283 of the judgment of Abdoolcader FJ).

[10] Applying the above legal principles to the facts of this case, I hold that the applicant has discharged the burden as regards the first ingredient. The evidence produced by the plaintiff demonstrates a good arguable case with the prospect of success at the trial. I hold to this effect because the parties had executed two shareholder agreements giving rise to the fiduciary duties alleged by the 1st plaintiff as being due to him from the 1st defendant. The response of the 1st defendant to this alleged fiduciary duty is that the shareholder agreements were determined by conduct and consequently no such duties were owed by him. The basis for the 1st defendant's claim that the shareholder agreements had been determined is that the 1st plaintiff through the conduct of Mr. Philip Finlay abandoned the joint venture when he tendered his resignation from the 22nd defendant. In my opinion, although there is evidence that the terms of the shareholder agreements were not always implemented to the letter of the agreement, the 1st defendant had always acknowledged the 1st plaintiff as the majority shareholder of both companies as evidenced by the respect accorded by him to directives originating from the 1st plaintiff. For example in para 60 of encl. 13, the 1st defendant acknowledges "that when Robert Doran said that he wanted Philip Finlay to be stationed in Malaysia, I did not disagree at it was his prerogative to have his representative stationed here". Indeed, the common theme throughout the affidavits affirmed by the 1st defendant is that it was the bad management style and decisions of the 1st plaintiff's representative, Mr. Philip Finlay that brought about the downfall of the 22nd defendant (see para 64 of encl. 13). Surely, the question that begs an answer, is, why would the 1st plaintiff and his representative be given such latitude in the management and decision making process of the 21st and 22nd defendants, if the shareholder agreements had been determined? Besides, in a venture of this size and complexity, one would expect the 1st defendant to be able to produce some documentary evidence evidencing the determination of the agreements. As regards, the submission of counsel for the 1st defendant, that the resignation of Mr. Finlay as a Director of the 22nd defendant amounted to an abandonment of the joint venture, this overlook the claim of Mr. Finlay that he resigned under 'forced' circumstances. Against this background of facts, whether the two shareholder agreements are subsisting or determined, in law, is a serious question to be tried. As regards, the second ingredient, there is no doubt that the assets of the 22nd

defendant are still within the jurisdiction as the 1st defendant acknowledges to having transferred the assets of the 22nd defendant to three locally registered companies in the form of the 15th to the 17th defendant. Additionally, there appear to be a host of other assets belonging to the 1st defendant and the remaining defendants within the jurisdiction of this court.

[11] As in most cases, the most difficult area relates to the examination of the available evidence to ascertain whether there is a risk that the assets would be dissipated so as to justify the granting of the Mareva injunction. The difficulty arises because invariably a dishonest defendant will cover his/her tracks, making it difficult for the plaintiff to produce the necessary relevant evidence. It is for this reason that the courts have over a period of time pronounced that when determining the risk of dissipation, the court is entitled to draw inferences from the defendant's previous action which show that his probity is not to be relied upon or that the corporate structure of the defendant is not to be relied upon. Of course, in considering the probity of the defendant or the lack of it, the court should also examine closely the evidence raised by way of rebuttal by the defendant.

[12] In my opinion, there is overwhelming objective evidence of *prima facie* dishonest conduct on the part of the 1st defendant and his associates in the form of the remaining defendants and in the full circumstances of the case, a real risk of the defendants dissipating the assets to avoid satisfying any judgment that the plaintiff may obtain in this action. I opine to this effect for the following reasons;

a) Section 218 notices were all issued on 14 April 2008. In all the cases, the covering letters were also dated 14 April 2008. The notices were preceded by the issuance of confirmation of indebtedness by the 22nd defendant through a document signed by one Yvonne Yeo, the accountant of the 22nd defendant (see exh. PF 36 to enc. 2A). Now, for a number of reasons I have reservations about the precise amounts due to the creditors who issued the 218 notices.

    i) The letter issued by Yvonne to the 19th defendant confirming the quantum of the 22nd defendant's indebtedness to it, is dated 31 March 2008 and is

purportedly by way of reply to a letter from the 19th defendant, also dated the same date. This letter from the 19th defendant of 31 March 2008 takes the form of a 'confirmation request'. The four documents in exh. PF36 to encl. 2A relating to the 19th defendant read together imply that an indebtedness in excess of RM1 million was confirmed by Yvonne on the very same day that confirmation was sought. The same pattern appears to have been followed with regards all the remaining creditors including the 1st defendant. The contents of exh. PF36 raises concerns that the quantum of the debt due to the five creditors may not have been properly verified by the 22nd defendant. That my concerns are justified is borne out by the minutes of the Board Meeting of 27 June 2008 (exh. PF44 to encl. 2A). At this meeting, Mr. Philip Finlay informed the Board that the outstanding debts due to the creditors of the 22nd defendant were yet to be reconciled and that there will be a plan to pay the creditors. His assertions to this effect were not disputed by the remaining Directors including the 1st defendant, who was chairing the meeting. In my opinion, the absence of any challenge by the 1st defendant lends credence to the claim of Mr. Finlay in encl. 2 that he had been assured by Mr. Deric & Mr. Tony Leong that they would sort out the 218 notices with the defendant's father and that the plaintiff had nothing to worry about the notices (see paras 82 to 83 of encl. 2). The 1st defendant was aware of Mr. Finlay's attitude to the 218 notices before the meeting of 27 June 2008 (see para 86 of encl. 2);

ii) The statement by the 1st defendant that Yvonne Yeo was replaced by a person appointed by Mr. Philip Finlay as accounts Manager of the 22nd defendant on 15 April 2008 only serves to further heighten my doubts about the genuineness of the confirmation request (see para. 8 of encl. 25). This statement of the 1st defendant raises concerns about when exactly all the documents in PF36 came into existence. Were these documents back-dated to accommodate the fact that Yvonne ceased to be the accountant of the

22nd defendant from 15 April 2008? The fact is that, the first time the 218 notices were delivered to Mr. Philip Finlay was on 21 May 2008 (see para. 78 to encl. 2); A

iii) Monies due to contractors in respect of construction works usually require to be certified by a Quantity Surveyor and the whole exercise is usually protracted due to the technical nature of construction contracts. Yet, Yvonne apparently was able to verify and confirm the claims of four different contractors and distinguish the 1st defendant's claim for expenses as opposed to contributions towards account of investments, all in one day; B C

iv) The 1st defendant makes the unusual admission for a Director that he was behind the issuance of the five 218 notices and for this reason, presumably, the confirmations of indebtedness, which preceded the notices (see para 78 of encl. 13). Why would a director want to instigate his creditors to close down his own company? D

v) Mr. Finlay asserted at the Board Meeting of 27 June 2008 that he has processed 430 metric tons of raw material and that the company needs to sell the products to pay the creditors. In paras 71 and 72 of encl. 2, Mr. Finlay values these processed materials to be worth approximately RM2.6 million. The assertions of Mr. Finlay at the Board Meeting were not disputed by the 1st defendant. The genuineness of the 1st plaintiff to keep the 22nd defendant afloat, is evident from the statement of Mr. Finlay at the same Board Meeting that he had personally paid the month's salary presumably, of the workers, without seeking funds from the remaining shareholders. Again, a statement not refuted by the 1st defendant at the Board Meeting; E F G

vi) Now, how does the 1st defendant reciprocate the 1st plaintiff's and Mr. Finlay's efforts to resolve the alleged financial crisis confronting the 22nd defendant? He appoints Cheong to be in sole charge of the sale of the processed material; he orders the re-organisation of the security personnel by the replacement of the old guards with new ones and they are to report to Cheong only and entry into H I

the factory is limited to named officers of the company only and Mr. Finlay is not one of them (see para 100/102 of encl. 2);

vii) There is no evidence forthcoming from Cheong or the 1st defendant as regards when, how and to whom, the 430 metric tons of processed material were sold and whether the proceeds of sale were utilized to settle the claims of the creditors as anticipated by Mr. Finlay and, if not, why not? The 1st defendant without accounting for these proceeds of sale and probably without realising what he is getting into, instead in para 81 of encl. 13 condemns the 22nd defendant as being a company without any income. The question is, did the 22nd defendant end up being without any income because of the very acts of the 1st defendant and his fellow Director Cheong? The answer to this question which can only derived at trial is of utmost importance because as I have mentioned earlier in this judgment, by the 1st defendant's own admission, he instigated the creditors to issue the 218 notices;

viii) Finally, I have doubts about whether the deed of settlement of debt purportedly executed by the 22nd defendant with the 15th to the 17th defendants are genuine. Over and above the earlier concerns expressed by me about the accuracy of the confirmation request, there are also concerns about genuineness as;

a) The agreements between the 22nd defendant and the 15th to the 17th defendants are all dated 21 July 2008 although the tenders for the machinery forming the subject matter of the agreements were subsequent in point of time (see pp 1236 and 1239 of encl. 25 D);

b) The agreements are not stamped; and

c) The vendors and purchasers appear to have executed the agreements in the wrong places and their signatures are not attested.

b) The conduct of the 1st defendant in the events leading to the liquidation of the 22nd defendant are also questionable. As submitted by counsel for the plaintiff, if three of the five

creditors settled their claim by way of the deed of settlement, this would leave the 22nd defendant with only two creditors ie, the 1st and 14th defendant. It therefore stands to reason that it must have been their claims that caused the winding-up of the 22nd defendant. However, as submitted by counsel for the plaintiff, in para 53 of encl. A(4) their claims also coincide almost exactly with their alleged investment in the 22nd defendant (see p. 187 of the 1st defendant's affidavit of 29 September 2009 and para. 13 of his affidavit affirmed on 12 October 2009). The logical question confronting the 1st and 14th defendants is, how could they claim to be investors in one breadth and creditors in another. In my opinion, this discrepancy affords another instance of *prima facie* evidence of conduct lacking in probity on the part of the affected defendants.

c) The amendment to article 90 of the article of association of the 22nd defendant is of utmost importance since it this amendment that led to the passing the resolutions which are clearly prejudicial to the interest of the plaintiff. The 1st defendant seeks to justify the amendment on the ground that, notwithstanding, the existence of the shareholder agreements, the registered shareholders of the company from inception until 2007 remained Deric Leong and the 1st defendant. For this reason, the 1st defendant alleges that the members resolution approved by 1st defendant and Deric Leong are valid and effective in law (see para. 77 of encl. 13). The moot point is whether Mr. Finlay's consent to the amendment was for the limited purpose made known to him only? Clearly, this is not an issue that can be resolved by affidavit evidence. However, the passing of the circular resolution is another matter. Apart from the discrepancy arising from the Director's resolution having being signed by Mr. Finlay on 28 August 2007 and the Members' resolution having been passed on 15 August 2007. In my judgment, if the shareholder agreements are valid, the circumstances under which the resolutions were passed are clearly matters that afford *prima facie* evidence of a lack of probity on the part of the 1st defendant. At the least, the 1st defendant ought to have provided the plaintiff with notice of the matters forming the subject matter of the circular resolutions. The reasons advanced by the 1st defendant in para 77 of encl. 13 for justifying his conduct are inconsistent with his obligations

under the shareholder agreements and at complete variance with the manner with which the wishes of the 1st plaintiff had been accommodated until then.

d) The lack of probity on the part of the 1st defendant, with regards the passing of resolutions at the Board Meeting of 27 June 2008 is this. The passing of resolution was not an item on the agenda and were passed after Mr. Finlay had left the meeting. The 1st defendant has much to explain at the trial of this action as to how the Board of the 22nd defendant came to approve resolutions of such importance when the Board did not consider the resolutions to be important enough to be placed on the agenda for discussion at the meeting. It is submitted by counsel for the 1st defendant that even if notice was given to the plaintiff and Mr. Philip Finlay, the resolutions would have still been carried given that 1st defendant had control of the Board at the time. With respect, the same argument raised before the court in the case of *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 was dismissed by the court although in that case it was raised in the context of a general meeting of the company. Edgar Joseph Jr J (as he then was) had this to say concerning such a submission "Looking back, I would emphasize that the right to vote is one of a member's fundamental rights for it is by his vote that he gets his voice heard in the company's affairs. That being so, the submission that even if the proxy Miss Khoo Gaik Tee had not been excluded and had voted at the AGM, the result of the poll would have been the same, having regard to the fact that her principal the plaintiff was only a minor shareholder, is clearly untenable". In my judgment, there is no reason why the same principles should not apply to the meeting of the Directors.

e) The allotment of 2 million shares in the 21st defendant to the 18th and 19th defendants is equally bizarre. I fail to understand the need to allot shares of this magnitude when the amount to be paid on allotment is the nominal sum of RM0.01 per share for every RM1 share. Again, the allotment is clearly prejudicial to the 1st plaintiff and effected without any notice to the 1st plaintiff. These two factors persuades me to infer, at this

juncture, that the 1st defendant altered the corporate structure of the 21st and 22nd defendant to suit his personal ends. Of course, the 1st defendant may be able to persuade me otherwise at the trial of this action but on the available affidavit evidence, I am satisfied that even in the matters relating to the 21st defendant, there exists *prima facie* evidence of the lack of probity on the part of the 1st defendant.

f) Counsel for the 1st defendant submits that there is evidence that the legal and beneficial owner of the Tiffany property is 20th defendant. The basis for this submission is that although the 1st plaintiff had paid the initial deposit, the balance had been paid by the 20th defendant through finance raised by it. With reference to exh. KPS38 p. 703, counsel submits that this document affords evidence of the repayment of the deposit by the 20th defendant. With respect, this submission is flawed since there is no evidence that the 1st plaintiff authorised the 20th defendant to assume the liability for the payment of the balance of the purchase price and neither is there any evidence of the 1st plaintiff authorizing the repayment of the deposit originating from him personally, to the 22nd defendant. Indeed, the contents of KPS38 p. 703 affords further *prima facie* evidence of the lack of probity on the part of the 1st defendant bearing in mind the role played by Cheong Chan Wan in dealing with the sale of the processed material.

[13] I do not propose to dwell on the remaining issues raised by the plaintiff such as the insurance claim and the Tadweer Material since I have already come to the conclusion that there exists *prima facie* evidence of the lack of probity on the part of the 1st defendant and the remaining defendants. It is also my finding that a refusal of the injunction would involve a real risk that any judgment in favour of the plaintiff would remain unsatisfied due to the risk of the dissipation of assets. I therefore hold that it is just and convenient that this court grants the prayers sought by the plaintiff in encl. 4 until the trial of this action. I therefore allow all the prayers in encl. 4 until the trial of this action and dismiss prayers (a) and (b) of encl. 13 with costs. I adjourn the hearing of prayers (c) and (d) of encl. 13 and the issue of quantum of costs payable by the defendants to 5 November 2009.